

03-03-2003

U.S. Patent & TMO/TM Mail Rpt. Dt. #40

UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD

GUSTAFSON, LLC,

Opposer

v.

BAYER CORPORATION

Applicant

Opposition No. 91,153,438

Application Serial No. 78/103187

RESPONSE TO NOTICE OF DEFAULT

Pursuant to Federal Rule of Civil Procedure 55 and TBMP § 317.02, Bayer Corporation ("Applicant"), by its counsel, responds to the Notice of Default entered January 30, 2003 for failure to file a timely Answer to the Notice of Opposition in this matter.

1. The deadline by which to file an Answer to the Notice of Opposition was December 24, 2002.
2. On January 30, 2003, the Trademark Trial and Appeal Board ("Board") issued a Notice of Default against Applicant.
3. A Notice of Default should be set aside if the Applicant can show good cause for failing to file a timely Answer. Good cause exists if the delay was not the result of willful conduct or gross neglect on the part of Applicant, the Opposer will not be substantially prejudiced by the delay, and the Applicant has a meritorious defense. TBMP § 317.02.
4. Applicant's failure to file an Answer to the Notice of Opposition was due to inadvertence on the part of Applicant's counsel: the Notice of Opposition was inadvertently misfiled and was not retrieved until Applicant received the Notice of Default. Inadvertence by counsel does not constitute gross neglect or willful conduct. Fred Hayman Beverly Hills, Inc. v. Jacques Bernier, Inc., 21 U.S.P.Q.2d 1556, 1557 (T.T.A.B. 1991). Further, Applicant's delay

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will not prejudice Opposer. Id.; Regatta Sport Ltd. v. Telux-Pioneer, Inc., 20 U.S.P.Q.2d 1154, 1156 (T.T.A.B. 1991) ("[D]elay alone is not a sufficient basis for establishing prejudice.").

5. Pursuant to TBMP § 317.01, Applicant also submits its Answer to the Notice of Opposition with this Response, which contains a meritorious defense.

6. In sum, the delay in filing an Answer to the Notice of Opposition was not the result of willful conduct or gross negligence on the part of Applicant, the Opposer will not be substantially prejudiced by the delay, and Applicant has a meritorious defense. This constitutes good cause for why default judgment should not be entered. TBMP § 317.02. Further, the determination of whether default judgment should be entered against a party lies within the sound discretion of the Board. The Board's policy is to decide cases on their merits. Accordingly, the Board is very reluctant to enter a default judgment for failure to file a timely Answer and tends to resolve any doubt on the matter in favor of the Applicant. Id.

WHEREFORE, Applicant respectfully requests that the Board decline to enter a default judgment in this case and accept Applicant's Answer to the Notice of Opposition.

Respectfully submitted,

PATTISHALL, McAULIFFE, NEWBURY,
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BAYER CORPORATION

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ANSWER TO NOTICE OF OPPOSITION

Bayer Corporation ("Applicant"), by its counsel, hereby responds to the Notice of Opposition filed by Gustafson, LLC ("Opposer"), as follows:

1. Applicant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 1 and therefore denies those allegations.
2. Applicant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 2 and therefore denies those allegations.
3. Applicant admits the allegations of Paragraph 3.
4. Applicant admits the allegations of Paragraph 4.
5. Applicant admits it filed a trademark application for TRIMAX in connection with "insecticides, pesticides and herbicides for domestic, agricultural, and other professional use" on January 17, 2002. Applicant denies the remaining allegations of Paragraph 5.
6. Applicant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 6 and therefore denies those allegations.
7. Applicant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegation that the goods of Applicant and Opposer "are in similar channels

of commerce" and therefore denies that allegation. Applicant denies the remaining allegations in Paragraph 7.

8. Applicant admits the allegations of Paragraph 8.

WHEREFORE, Applicant respectfully requests that the above opposition be dismissed.

Respectfully submitted,

PATTISHALL, McAULIFFE, NEWBURY,
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March 3, 2003

BOX TTAB NO FEE

Assistant Commissioner for
Trademarks

2900 Crystal Drive

Arlington VA 22202-3513

Attn: Eric McWilliams, Legal Assistant

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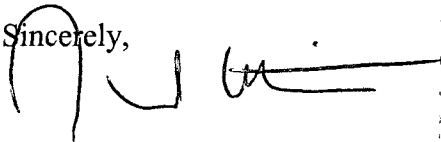
Dear Mr. McWilliams:

We enclose the following:

1. Response to Notice of Default;
2. Answer to Notice of Opposition; and
3. A return-addressed, postage-paid postcard evidencing receipt of these documents.

Please call us if you have any questions.

Sincerely,



TC/mdr

Encl.

cc: Fred Carl III, Esq.
Raymond I. Geraldson, Jr., Esq.